



KAPLAN KIRSCH ROCKWELL

226269

January 8, 2010

Office of Proceedings

Surface Transportation Board

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Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Norfolk Southern Railway Company – Petition for Exemption – Abandonment of Rail Freight Service Operations – In the City of Baltimore, MD and Baltimore County, MD*; STB Docket No. AB-290 (Sub-No. 311X)

Dear Sir or Madam:

I am enclosing the Reply of the Maryland Transit Administration to James Riffin's Motion for Protective Order in the above-referenced proceeding.

Thank you.

Sincerely,

Charles A. Spivak

Enclosure

cc: All Parties of Record

264457

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**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

STB Docket No. AB-290 (Sub-No. 311X)

**NORFOLK SOUTHERN RAILWAY COMPANY –
PETITION FOR EXEMPTION
ABANDONMENT OF RAIL FREIGHT SERVICE OPERATION
IN THE CITY OF BALTIMORE, MD AND BALTIMORE COUNTY, MD**

**REPLY OF THE MARYLAND TRANSIT ADMINISTRATION
TO MOTION FOR A PROTECTIVE ORDER**

The Maryland Transit Administration (“MTA”), a modal administration of the Maryland Department of Transportation (“MDOT”) acting on behalf of MDOT, hereby responds to the January 5, 2010, Motion of James Riffin for a Protective Order pursuant to 49 C.F.R. § 1104.14(b) (the “Riffin Motion”).¹ MTA submits that if a Protective Order is appropriate in this proceeding at all, the draft Order attached to this Reply should be entered.

If a Protective Order is required in this proceeding at all, the form of the Order proposed by Mr. Riffin is overbroad: there are no valid commercial reasons to keep the personnel of the MTA, MDOT, other modal administrations of MDOT and their counsel (whether in-house or outside counsel) from having full access to any information that may be relevant to this matter. A Protective Order is typically designed to protect commercially sensitive data from competitors.

¹ Although the Riffin Motion indicates that the potential Offerors in this proceeding collectively consist of James Riffin, Zandra Rudo, Carl Delmont, Lois Lowe, Eric Strohmeyer and potentially other as yet-unidentified persons, only Mr. Riffin has signed the Motion. MTA expects that any Protective Order that may be adopted in this proceeding will apply to each Offeror, whether currently identified or as may be identified in the future.

See Canadian National Rwy. Co.–Trackage Rights Exemption–Detroit River Tunnel Co., STB Finance Docket No. 34001 (STB Served March 9, 2001), *slip op.* at 1.²

Quite simply, MTA and its sister modal administrations of MDOT are not competitors of any commercial freight rail service Mr. Riffin would seek to operate. They are public bodies providing or facilitating public passenger rail transportation and not private freight operators. “Competition” is defined as “the effort of two or more parties acting independently *to secure the business of a third party* by offering the most favorable terms”; a “competitor” is “one selling or buying goods or services *in the same market* as another.” WEBSTER’S NEW COLLEGIATE DICTIONARY, 227-228 (1981) (emphasis added). Here, the fundamental element of a competitive relationship, multiple players vying for business in a common market, is entirely absent. The putative market for rail freight services Riffin claims he wishes to serve on the Cockeysville Industrial Track (the “Line”), of which he provides no verified proof, is an entirely different market than the light rail passenger service MTA provides on the line. Mr. Riffin’s argument that MTA is a “competitor” because it provides subsidies to businesses that formerly shipped goods on the Line strains the concept of competition excessively. MTA is not “selling” trucking services by providing the subsidies, as Riffin asserts (Riffin Motion at ¶ 6). It has done nothing more than exercise its legitimate interest as owner of the property to encourage former shippers to use non-rail transportation rather than rely upon a corridor to which Mr. Riffin has no rights. Furthermore, whether or not Mr. Riffin considers MTA a competitor (Riffin Motion at ¶¶ 5, 6) is irrelevant. If, as here, there are no objective, commercially reasonable and cognizable indicia of

² Additionally, Mr. Riffin includes unverified allegations at ¶ 4 of the Riffin Motion that are irrelevant to the Board’s consideration of his request for a Protective Order. Riffin fails to note that this Board gave no credence whatsoever to these allegations in its Decision in STB Docket No. AB-290 (Sub-No. 237X), *slip op.* (Service Date Mar. 31, 2006). Furthermore, MTA has addressed in detail, and the Board has considered and rejected these allegations, in *Maryland Transit Administration – Petition for Declaratory Order*, STB Finance Docket No. 34975 (Service Date Oct. 9, 2007), *slip op.* at 7-8. Accordingly, MTA requests that the Board strike ¶ 4 of the Riffin Motion.

a competitive environment, no competition exists. Accordingly, Riffin's argument that MTA or other components of MDOT would be competitors of his proposed service is unavailing.

Because MTA, MDOT and the MDOT modal administrations do not compete with Mr. Riffin's putative operation, a typical protective order is not required. The proposed Protective Order attached to this Reply as Appendix A is consistent with Protective Orders adopted by this Board where public entities are participating in a proceeding to protect the interests of the citizens and residents of their jurisdictions but have no competitive, commercial interest in the transaction at issue. *See, e.g., The City of Alexandria, Va.—Petition for Declaratory Order*, STB Finance Docket No. 35157 (STB served Dec. 29, 2008).

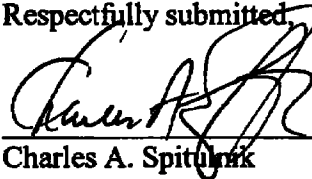
Furthermore, on its face, the Riffin Motion clearly indicates that Mr. Riffin has no present commercial relationships that would benefit from the issuance of a Protective Order. Mr. Riffin forthrightly states, “[t]he relationship between Riffin and [prospective shippers] is tenuous, and will remain tenuous until such time that Riffin demonstrates that he can in fact provide freight rail service in Cockeysville.” Riffin Motion at ¶ 3. Given the issues that have repeatedly arisen with the veracity of Mr. Riffin's prior submissions to the Board,³ MTA further proposes that Mr. Riffin be required to submit a certification regarding the confidential or highly confidential nature of all information for which he seeks to claim Confidential or Highly

³ *See, e.g., James Riffin D/B/A The Northern Central Railroad—Acquisition and Operation Exemption—In York Co., PA*, STB Finance Docket No. 34501 (STB Served Feb. 23, 2005), *slip op.* at 5 (in revoking exemption, the Board held that, “[h]ere, it appears that [Riffin d/b/a] NCR is attempting to use the cover of Board authority allowing rail operations in Pennsylvania to shield seemingly independent operations and construction in Maryland from legitimate processes of state law. . . . The Board has a responsibility to protect the integrity of its processes, and the Board is concerned that Riffin may be using the licensing process in improper ways.”); *James Riffin D/B/A The Northern Central R.—Acquisition and Operation Exemption—In York Co., PA, and Baltimore Co., MD*, STB Finance Docket No. 34484 (STB Served April 20, 2004), *slip op.* at 2 (revoking Riffin's purported notice of exemption as insufficient to justify the use of the streamlined exemption procedures due to the multiplicity of factual and legal issues Riffin failed to adequately address).

Confidential status. MTA has accordingly added language to paragraphs 3 and 5 of Appendix A.

For the reasons stated above, MTA respectfully requests that the Board issue a Protective Order in the form that is attached to this Reply as Appendix A.

Respectfully submitted,



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Date: January 8, 2010

Attorneys for the
Maryland Transit Administration

APPENDIX A
PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) "Confidential Documents" means documents and other tangible materials containing or reflecting Confidential Information.

(b) "Confidential Information" means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts, confidential financial and cost data, and other confidential or proprietary business or personal information.

(c) "Designated Material" means any documents designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in accordance with paragraph 2, 3, 4 or 5 of this Protective Order, and any Confidential Information contained in such materials.

(d) "MDOT" means the Maryland Department of Transportation.

(e) "MTA" means the Maryland Transit Administration.

(f) "Proceedings" means those before the Surface Transportation Board ("the Board") concerning any directly related proceedings covered by STB Docket No. AB-290 (Sub-No. 311X), and any related proceedings before the Board, and any judicial review proceedings arising from the same or from any related proceedings before the Board.

(g) "STB" means the U.S. Surface Transportation Board.

2. If the MTA, MDOT or any of MDOT's modal administrations as a party to these Proceedings determines that any part of a document it submits, discovery request it propounds,

discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents so designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter.

3. If James Riffin, Zandra Rudo, Carl Delmont, Lowis Lowe, Eric Strohmeyer, or any other prospective offeror to be identified as a party to these Proceedings determines that any part of a document he or she submits, discovery request he or she propounds, discovery response he or she produces, transcript of a deposition or hearing in which he or she participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then such party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Each such party shall include with his or her information or documents a public certification to the Board describing the confidential nature of the information or documents so designated. Unless MTA, MDOT or the Board objects to such certification, any information or documents so designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter.

4. If MTA, MDOT or any of MDOT's modal administrations as a party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains shipper-specific rate or cost data, trackage rights compensation levels, or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information

as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped as "HIGHLY CONFIDENTIAL" shall be handled as provided hereinafter.

5. If James Riffin, Zandra Rudo, Carl Delmont, Lowis Lowe, Eric Strohmeyer, or any other prospective offeror to be identified as a party to these Proceedings determines that any part of a document he or she submits, discovery request he or she propounds, discovery response he or she produces, transcript of a deposition or hearing in which he or she participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains shipper-specific rate or cost data, trackage rights compensation levels, or other competitively sensitive or proprietary information, then he may designate and stamp such Confidential Information as "HIGHLY CONFIDENTIAL." Every such party shall include with his or her information or documents a public certification to the Board describing the highly confidential nature of the information or documents so designated. Unless the MTA, MDOT or the Board objects to such certification, any information or documents so designated or stamped as "HIGHLY CONFIDENTIAL" shall be handled as provided hereinafter.

6. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.

7. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any person or entity except to an employee

of MTA, MDOT or one of the modal administrations of MDOT or to an outside counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at **Exhibit B** to this order.

8. In the event that a party determines that additional individuals need access to “Highly Confidential” documents, the party must notify the opposing party: (1) identifying the individual or individuals to whom the party would like to disclose “Highly Confidential” documents, and (2) identifying the “Highly Confidential” documents to be disclosed, after which the opposing party has 24 hours either to consent or to object to the additional disclosure. If the opposing party objects to the additional disclosure, the “Highly Confidential” documents will not be disclosed until the objection is resolved either by agreement of the parties or by the STB.

9. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the STB to adjudicate such challenges.

10. Designated Material must be kept either in the office of outside counsel or in the office of the Counsel of MTA, may not be copied, and may not be used for any purposes, including without limitation any business, commercial, or competitive purposes, other than the preparation and presentation of evidence and argument in the Proceedings, and/or any judicial review proceedings in connection with the Proceedings and/or with any related proceedings.

11. Any party who receives Designated Material in discovery shall return or destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the STB and retained by outside counsel for a party to

these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

12. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the STB unless the pleading or other document is submitted under seal pursuant to the rules of this Board.

13. No party may present or otherwise use any Designated Material at a hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the STB to whom relevant authority has been lawfully delegated by the STB, and has accompanied such submission with a written request that the STB: (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

14. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in this Protective Order.

15. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with

paragraphs 1, 2, or 3 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any other relevant provision of the ICC Termination Act of 1995.

16. All parties must comply with all of the provisions of this Protective Order unless the STB determines that good cause has been shown warranting suspension of any of the provisions herein.

17. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

18. Any party filing with the Board a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pleading in these Proceedings shall simultaneously file a public version of the pleading.

EXHIBIT A

UNDERTAKING

CONFIDENTIAL INFORMATION

I, _____, have read the Protective Order served on _____, 2010, governing the production and use of Confidential Information and Confidential Documents in STB Docket No. AB-290 (Sub-No. 311X), understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. AB-290 (Sub-No. 311X), before the Surface Transportation Board ("Board"), and/or any judicial review proceedings in connection with STB Docket No. AB-290 (Sub-No. 311X). I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this Proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking, but shall be in addition to all remedies available at law or equity.

Signed: _____

Position: _____

Affiliation: _____

Date: _____

EXHIBIT B

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

I, _____, am outside [counsel] [consultant] [other] for [Party to Proceeding], for whom I am acting in this Proceeding. I have read the Protective Order served on _____, 2010, governing the production and use of Highly Confidential Information and Highly Confidential Documents in STB Docket No. AB-290 (Sub-No. 311X), understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Highly Confidential Information or Highly Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. AB-290 (Sub-No. 311X) before the Surface Transportation Board ("Board"), or any judicial review proceedings in connection with STB Docket No. AB-290 (Sub-No. 311X). I further agree not to disclose any Highly Confidential Information, Highly Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Highly Confidential Undertakings in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to assure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners. At the conclusion of this Proceeding (including any proceeding on administrative review, judicial review, or remand), I agree to destroy promptly any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking, but shall be in addition to all remedies available at law or equity.

Signed: _____

Position: _____

Affiliation: _____

Date: _____

Certificate of Service


I hereby certify that I have this day caused to be served a copy of the foregoing REPLY
OF THE MARYLAND TRANSIT ADMINISTRATION TO MOTION FOR A PROTECTIVE
ORDER to be served by first class mail, postage prepaid upon the following:

James R. Paschall, Senior General Attorney
Daniel G. Kruger, Attorney
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

Cheryl Kerr
Maryland Department Of The Environment
1800 Washington Boulevard
Baltimore, MD 21230

James Riffin, Zandra Rudo, Carl Delmont,
Lois Lowe and Eric Strohmeyer
1941 Greenspring Drive
Timonium, MD 21093

Dated this 8th day of January, 2010.



Charles A. Spitznik